No. 78-1005

In the Supreme Court of the United States

OCTOBER TERM, 1978

HAROLD R. BROWN, SECRETARY OF DEFENSE, ET AL.,
PETITIONERS

v.

WAYNE M. ALLEN, ET AL.

HAROLD R. BROWN, SECRETARY OF DEFENSE, ET AL.,
PETITIONERS

v.

GEORGE T. MOSES, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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The Solicitor General, on behalf of the Secretary of Defense and the other federal defendants,[1] petitions for a writ of certiorari to review the judgment

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[1] The other defendants are the Secretary of the Navy and the Commanding Officers of the U.S.S. HANCOCK and U.S.S. MIDWAY.

of the United States Court of Appeals for the Ninth Circuit in these consolidated cases.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-12a) is reported at 583 F.2d 438. The opinion of the district court (App. B, *infra*, 13a-32a) is reported at 404 F. Supp. 1081.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Navy regulations that require military personnel to obtain approval before circulating on Navy ships petitions to members of Congress are invalid under 10 U.S.C. 1034.

CONSTITUTIONAL PROVISION, STATUTE, AND REGULATIONS INVOLVED

1. The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. 10 U.S.C. 1034 provides:

> No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States.

3. Section 3(a) of U.S.S. MIDWAY Instruction 1620.6 provides in relevant part:[2]

> (1) In the case of publications, including but not limited to pamphlets, leaflets, newspapers and petitions, distributed through other than official shipboard outlets, such materials must be submitted to the Commanding Officer, USS MIDWAY (CVA 41) via the Ship's Legal Officer prior to circulation in order that he may determine whether there is a clear danger to the loyalty, discipline or morale of military personnel, or if the distribution of the publication would materially interfere with the accomplishment of a military mission. If such a determination is made, the material shall not be distributed.
>
> (2) If the Commanding Officer determines that an attempt will be made to circulate printed material which is prohibited from distribution, it will be impounded.

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[2] The other vessel involved in this case, the U.S.S. HANCOCK, had a regulation with operative language similar to the U.S.S. MIDWAY regulation quoted in the text. U.S.S. HANCOCK Instruction 1620.4A. The language of the two regulations was derived from Naval Instruction 1620.1 and Department of Defense Directive 1325.6.

STATEMENT

1. Navy regulations applicable to the U.S.S. MIDWAY and the U.S.S. HANCOCK provide that "publications, including * * * petitions, distributed through other than official shipboard outlets, * * * must be submitted to the Commanding Officer * * * prior to circulation in order that he may determine whether there is a clear danger to the loyalty, discipline or morale of military personnel, or if the distribution of the publication would materially interfere with the accomplishment of a military mission." U.S.S. MIDWAY Inst. 1620.6(3)(a); see U.S.S. HANCOCK Inst. 1620.4A(4)(a). "If such a determination is made, the distribution will be prohibited." *Ibid.*

In 1973 respondents were crew members on naval aircraft carriers stationed with the First Fleet in Alameda, California. As part of the "STOP OUR SHIPS (SOS)" movement, respondents prepared petitions addressed to members of Congress. The petitions protested the assignment of the aircraft carriers to duty with the Seventh Fleet in the West Pacific. The petitions objected to the use of the ships in the Indo-China area and "to the excessive expansion and imposion of United States military forces overseas." [3]

[3] The HANCOCK petition said:

Dear Congressman Stark,

We, the undersigned crew members of the U.S.S. HANCOCK, in recognition of the fact that the United States is officially no longer at war with the countries of Indo-China, and because the HANCOCK has already been in commission for 29 years, respectfully request that you ask Congress to investigate the necessity of having the HANCOCK make another West Pacific cruise.

The MIDWAY petition said:

We, the crew and families of the U.S.S. MIDWAY, do hereby exercise our rights as citizens of the United States of America to petition Congress on the following issue. We object to the homeporting in Yokosuka, Japan of the U.S.S. MIDWAY for the following reasons:

(1) We are freely opposed to the excessive expansion and imposition of United States military forces overseas. Homeporting the MIDWAY in Yokosuka is another attempt by the U.S. to permanently establish its military presence in Asia.

(2) We object to the false statements made by the military that there is an *all volunteer* crew to deploy to Yokosuka.

(3) We disapprove of the government's lack of preparations in providing housing and other living accommodations to support our full complement of crew and families.

(4) It is the right of all military personnel as citizen-soldiers of the U.S. to practice individually or collectively their rights as citizens, namely (a) the right to free speech, (b) the right to peacefully assemble, (c) freedom of the press, and (d) the right to petition Congress.

The respondents assigned to the U.S.S. HANCOCK sought permission from the commanding officer to circulate their petition. Permission was denied on the ground that its distribution "would present a clear danger to the loyalty, discipline, and morale of the military personnel aboard the U.S.S. HANCOCK * * * and would materially interfere with the accomplishment of its mission" (*Allen* Complaint Exh. G). One crew member then circulated the petition on board the HANCOCK and was disciplined for failure to obey the commanding officer's order.

The respondents assigned to the U.S.S. MIDWAY also requested permission to circulate their petition. Permission was denied on the grounds that "the large turnover in personnel and the attendant necessity to train such a large segment of the ship's company in the time allotted, combine to such an extent that the circulation of your petition would present a clear danger to the morale of your shipmates" and that "[a]ny impairment of their morale materially threatens this mission of the MIDWAY" (*Moses* Complaint Exh. F). A similar request to circulate a petition protesting the reassignment of the MIDWAY was again denied by the commanding officer, who explained that "[t]o allow a group of sailors to collectively protest a clearly lawful order would be inimical to the discipline of the crew" (*id.* at Exh. J). The officer stated, however, that "notwithstanding the foregoing, your right to communicate as individuals with members of Congress concerning any subject is reaffirmed and is specifically protected by Navy regulations" (*ibid.*).

Respondents then filed class actions, which were later consolidated, challenging the validity of the Navy's prior approval regulations. After a trial, the district court held that the regulations, as applied in non-combat zones, are unconstitutional because they "authorize a prior restraint on the publication and circulation of petitions to members of Congress," and "reach into protected as well as possibly unprotected First Amendment activity" (App. B, *infra*, 28a). The court further held that the regulations violate 10

U.S.C. 1034 "[t]o the extent that they authorize any interference with the circulation of petitions to Congress other than that expressly stated [in Section 1034]." (App. B, *infra*, 29a). The district court enjoined Navy officials from enforcing the prior approval regulations in non-combat zones against persons assigned to the U.S.S. MIDWAY or U.S.S. HANCOCK.

2. The court of appeals affirmed.[4] The court stated that it was unnecessary to reach the constitutional issue "because the district court's decision may be upheld on purely statutory grounds" (App. A, *infra*, 6a). The court expressly followed the analysis and holding of *Huff* v. *Secretary of the Navy*, 575 F.2d 907 (D.C. Cir. 1978), petition for cert. pending, No. 78-599, in concluding that the prior approval requirement of the challenged regulations violate 10 U.S.C. 1034.

REASONS FOR GRANTING THE PETITION

This case presents the same question that is pending before this Court in *Secretary of the Navy* v. *Huff*, petition for certiorari pending, No. 78-599.[5] We therefore believe that the disposition of this petition

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[4] The court held that the cases are not moot, even though the U.S.S. HANCOCK has been decommissioned and the class representatives have been discharged from military service, because the issues raised were " 'capable of repetition, yet evading review' " (App. A, *infra* 5a).

[5] A copy of the petition in *Huff* is being sent to counsel for respondents.

should be deferred pending disposition of the petition in *Huff*.

CONCLUSION

The Court should defer disposition of the petition pending its disposition of *Secretary of the Navy* v. *Huff*.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1978

APPENDIX A

UNITED STATES COURT OF APPEALS NINTH CIRCUIT

No. 76-1125

WAYNE M. ALLEN ET AL., APPELLEES

v.

A. J. MONGER ET AL., APPELLANTS

GEORGE T. MOSES ET AL., APPELLEES

v.

S. R. FOLEY, JR., ET AL., APPELLANTS

Oct. 4, 1978

Appeal from the United States District Court for the Northern District of California.

Before GOODWIN and HUG, Circuit Judges and PALMIERI,* District Judge.

GOODWIN, Circuit Judge:

The government appeals a decree enjoining enforcement by the Navy of regulations restricting sailors in the circulation of petitions addressed to members of Congress. We affirm.

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* The Honorable Edmund L. Palmieri, United States District Judge for the Southern District of New York, sitting by designation.

In the spring of 1973 some crew members on two aircraft carriers stationed in Alameda, California, prepared petitions to various members of Congress, objecting to planned movements of their ships. Certain enlisted men of the U.S.S. Hancock objected to another West Pacific cruise. Some crew members of the U.S.S. Midway opposed its intended homeporting in Japan.

The Hancock protesters had their petition [1] printed off the base, and requested Captain (now Admiral) Monger, the Hancock's commanding officer, to authorize its distribution. Captain Monger denied permission, citing U.S.S. Hancock Instruction 1620.4A, which was based on Naval Instruction 1620.1. These instructions require prior approval for the distribution of printed materials. The commander may deny permission if the materials present "a clear danger to the loyalty, discipline, or morale of military personnel" or if the distribution "would materially interfere with the accomplishment of a military mission." Captain Monger said that circulating the petition might upset the morale and discipline of a green crew preparing for a new cruise.

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[1] The Hancock petition said:

"Dear Congressman Stark,

We, the undersigned crew members of the U.S.S. HANCOCK, in recognition of the fact that the United States is officially no longer at war with the countries of Indo-China, and because the HANCOCK has already been in commission for 29 years, respectfully request that you ask Congress to investigate the necessity of having the HANCOCK make another West Pacific cruise."

One protester distributed the petition despite Captain Monger's action, and was subsequently punished at a Captain's Mast. Other sailors were deterred from circulating the petition.

Certain crew members on the Midway also sought to circulate a petition to members of Congress opposing a proposed change in home ports.[2] Like the Hancock petition, the Midway petition did not suggest that anyone should disobey an order or otherwise refuse to do his duty. This petition was also printed off base at no expense to the government. The peti-

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[2] The Midway petition said:

"We, the crew and families of the U.S.S. Midway, do hereby exercise our rights as citizens of the United States of America to petition Congress on the following issue. We object to the homeporting in Yokosuka, Japan of the U.S.S. Midway for the following reasons:

"(1) We are freely opposed to the excessive expansion and imposition of United States military forces overseas. Homeporting the Midway in Yokosuka is another attempt by the U.S. to permanently establish its military presence in Asia.

"(2) We object to the false statements made by the military that there is an *all volunteer* crew to deploy to Yokosuka.

"(3) We disapprove of the government's lack of preparations in providing housing and other living accommodations to support our full complement of crew and families.

"(4) It is the right of all military personnel as citizen-soldiers of the U.S. to practice individually or collectively their rights as citizens, namely, (a) the right to free speech, (b) the right to peacefully assemble, (c) freedom of the press, and (d) the right to petition Congress."

tioners requested Captain (now Admiral) Foley, the Midway's commander, to permit circulation of the petition, and he refused. He later refused to permit circulation of a slightly modified petition. He based his refusal upon Midway Instruction 1620.6, which was also derived from Naval Instruction 1620.1. Because of Captain Foley's decision, the Midway petitioners did not circulate the petition on board ship.

Both the Hancock and the Midway protesters filed actions in district court, alleging that the restrictions on petitioning were unconstitutional abridgements of their First Amendment rights and that they violated 10 U.S.C. § 1034.

The district court consolidated the cases. The court then held the cases in abeyance pending naval administrative-review process. After at least one sailor from each ship lost his administrative appeal, the district court certified the actions as class actions.

The district court held that the regulations would have a chilling effect on the exercise of First Amendment rights, and held them to be invalid as applied and overbroad. The court also held that the regulations violated § 1034. The court enjoined enforcement, but provided the Navy leave to promulgate new regulations that would limit the time, place, and manner of petitioning to avoid interference with the ships' functioning. *Allen* v. *Monger*, 404 F.Supp. 1081 (N.D. Cal. 1975). The governmental appeal challenges the decrees in several respects.

I. MOOTNESS

A preliminary issue is whether the case is moot. The district court found jurisdiction under 28 U.S.C. § 1331. We have applied § 1331, as it stands after the 1976 amendment deleting the $10,000 jurisdictional amount, to a case filed before the amendment passed. *Stickelman* v. *United States*, 563 F.2d 413, 415 n.2 (9th Cir. 1977). Subject-matter jurisdiction under § 1331 has been satisfied.

The Hancock is no longer in service, and most, if not all, of the petitioners have since been discharged. The government therefore suggests that these cases are moot. Similar regulations, however, remain in effect throughout the Navy. No one now seeks to circulate the Hancock or Midway petitions. It is unlikely that any similar petition could keep the issue alive long enough for a case to reach this court on appeal. Military enlistments are for a few years at a time. Any particular plaintiff probably would complete an enlistment before he or she could complete the judicial process. Yet the regulations raise serious questions that deserve judicial review. These regulations and the resulting issues are clearly "capable of repetition, yet evading review," and therefore are not moot. *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515, 31 S.Ct. 279, 55 L.Ed. 310 (1911), *quoted in Roe* v. *Wade*, 410 U.S. 113, 125, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

II. PROTECTION FOR PETITIONING

On appeal, the petitioners again urge their constitutional arguments. However, because the district court's decision may be upheld on purely statutory grounds, we have no occasion to reach the constitutional issue.

Title 10 U.S.C. § 1034 provides:

> "No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States."

We must decide, first, whether § 1034 applies to concerted activities such as petitioners', and, second, whether the regulations which prohibited the circulation of the petition are "necessary to the security of the United States."

The District of Columbia Circuit recently considered both questions and held that § 1034 covers petitioning and that these regulations are not necessary to the national security. *Huff* v. *Secretary of the Navy*, —— U.S.App.D.C. ——, 575 F.2d 907 (1978). We agree.

Section 1034 prohibits restrictions on communications with Congress; it does not by its terms distinguish among different kinds of communications. Congress would no doubt consider a signed petition addressed to members of Congress to be communication with it.

Some military personnel might find it easier to communicate by signing a petition than by writing a letter. Others might believe that one petition signed by many voters would have more impact than scattered individual latters. While the statute speaks of "any member", we do not think its use of the singular is controlling. A literal reading would deny protection even to a letter if two people drafted and signed it. We prefer to read the statute in light of the traditional ways Americans communicate with their legislators; petitioning is traditional.

Congressman John W. Byrnes of Wisconsin first introduced the issue in the debates on the Universal Military Service and Training Act of 1951, Pub.L. 82-51, 65 Stat. 75 (1951). He did so because of the difficulty one of his constituents in the Navy asserted in writing him about an individual problem. The colloquy between Congressman Byrnes and Congressman Vinson, chairman of the House Armed Services Committee, primarily inquired into the current regulations to determine their effect upon communications concerning individual grievances. As originally adopted, the amendment prohibited drafting anyone into a branch of the armed forces that limited the rights of its members to communicate directly with members of Congress. 97 Cong.Rec. 3775-76 (April 12, 1951).

Since Congressman Byrnes' original amendment was to a proposed substitute to the pending bill, it lapsed when the substitute was defeated. Congressman Vinson wrote a different version, which Con-

gressman Byrnes approved and eventually introduced the next day. This version is the one Congress adopted, and, with minor amendments made in 1956, it is the source of § 1034.[3] Under this proposal, no member of the armed forces could be restricted from communicating "directly or indirectly" with any member or members of Congress "concerning any subject" unless the communication violated a law or a regulation necessary to the security and safety of the United States. 97 Cong.Rec. 3877, 3883 (April 13, 1951). While Congressman Vinson again described the statute as one letting any man write his congressman, the language indicated a broader purpose. It did not simply cover all branches instead of just those taking draftees; it also changed the nature of the right given.

Congressman Byrnes' original concern was with military persons facing individual hardships who wanted their congressman's help. His emphasis was on Navy regulations which seemed to limit direct communication on personal problems. The Congressman did not then object to Army regulations which severely restricted communications on general legislative matters. Letters of the Secretary of the Navy and of the Secretary of the Army to Congressman Byrnes, in 97 Cong.Rec. 3776 (April 12, 1951).

The Vinson modification, however, prohibited restrictions on communications "on any subject". This

[3] Act of June 19, 1951, Pub.L.No. 82-51, § 1(d) (last paragraph), 65 Stat. 78.

modification was made a day or two after President Truman's dismissal of General MacArthur, in part for his communicating with Congress outside regular channels, and about a week before the general addressed a joint session of Congress.[4] In this light, it seems clear that Congress was willing to break with traditional notions of military discipline in order to assure that Congress would receive communications reflecting a variety of military sentiment on important issues. In this change, Congress went well beyond Congressman Byrnes' original focus on individual grievances.

The Vinson proposal also allowed communicating "directly or indirectly" with members of Congress. This phrase may have been inspired by General MacArthur's use of press conferences, but it may also have been intended to cover enlisted persons who simply chose to sign petitions. Petitioners communicate with Congress, but they do so indirectly, by showing their approval of language someone else has written rather than by writing their own language. Congress deleted the "directly or indirectly" phrase, along with "concerning any subject", in 1956 when it adopted current § 1034. The codifiers note, correctly,

[4] Congressmen debated the bill with MacArthur's dismissal in mind. The issue immediately before Congressman Byrnes introduced the final version was a proposed amendment to give the commander in the field all power to decide what supply facilities, troop concentrations, and other targets to bomb. MacArthur's objections to the restraints President Truman placed on him in these regards were, of course, a major issue in his removal. 97 Cong.Rec. 3883 (April 13, 1951).

we believe, that the language was surplusage. The 1956 changes, therefore, did not change the statute's meaning. 10 U.S.C. § 1034, explanatory note.

The 1956 amendment also changed "member or members of Congress" to "member of Congress"; again, the change was to eliminate surplusage. This treatment of the plural encourages us to give less weight to the singular "any member of an armed force" in § 1034. Congress clearly intended to protect communication with several members of Congress at a time, even though it used the singular; while the record is not so clear, it is unlikely that Congress intended to restrict protected communication by more than one member of the armed forces at a time.

We therefore hold that § 1034 protects petitioning. The importance petitioning Congress has played in our history, combined with a legislative history that shows Congress concerned to keep communications open despite threats to discipline and a history of verbal changes in the statute that encourages a broad interpretation of its protections, all lead to this conclusion. The right to petition, of course, includes a reasonable opportunity to solicit signatures for the petition.

III. PRIOR RESTRAINTS

Naval Instruction 1620.1 and the related instructions on the Hancock and the Midway establish a system of prior restraint on petitions to Congress. They do not distinguish between ships at port in home waters and ships actively engaged in combat in a

combat zone. Under § 1034 these regulations are valid only if they are "necessary to the security of the United States". *Huff* v. *Secretary of the Navy*, —— U.S.App.D.C. at ——, 575 F.2d at 914. As did the District of Columbia Circuit in *Huff*, we hold that the Navy has failed to show that the national security required a system of prior restraints in these cases.

Both commanding officers apparently thought that circulation of the petitions might affect the discipline and morale of their commands. The actual circulation on the Hancock had produced some resentment among nonpetitioning sailors.[5] The district court took the view that time, place, and manner regulations could insure that petitioning would not disrupt the ships' orderly operations. The Uniform Code of Military Justice under certain circumstances enables the Navy to punish a crew member whose petition is truly disruptive. These petitions, while they were disagreeable to the Navy, did not threaten the national security.

The standard of protection under § 1034 is high. Congress in adopting it consciously chose to give communication with Congress preference over the prefer-

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[5] No commanding officer relishes the prospect of having a well-trained and dedicated military unit branded as "crybabies" by the patrons of service clubs, messes, and waterfront taverns. The damage to morale and the nuisance of resulting disorders cannot be ignored. The prospect of these dysfunctional results from the exercise of the rights protected by the statute apparently did not weigh as heavily upon the members of Congress as did the desire to keep communications open.

ences of military commanders. Prior restraints are suspect in the constitutional context. *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976); *New York Times Co.* v. *United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971). They stand no better in a statutory setting. Well publicized petitions may inconvenience the military. Some petitions may even produce division and morale problems, but we cannot say that there is no less restrictive method than total prior restraint to protect the national security. Since the regulations are overbroad and exceed the needs of the national security, we affirm the district court.

Greer v. *Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976), which the government emphasizes, does not apply to this case. *Greer* rejected the First Amendment claims of uninvited civilians on a military reservation. The present case deals with military personnel claiming rights under a statute enacted for their benefit.

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
N. D. CALIFORNIA

Nos. C-73-745 RFP and C-73-1012 RFP

WAYNE M. ALLEN ET AL., PLAINTIFFS

v.

A. J. MONGER ET AL., DEFENDANTS

GEORGE T. MOSES ET AL., PLAINTIFFS

v.

S. R. FOLEY, JR., ET AL., DEFENDANTS

July 11, 1975

David Cobin, Oakland, Cal., Joseph Remcho, Charles C. Marson, American Civil Liberties Union Foundation of Northern California, Inc., San Francisco, Cal., for plaintiffs Allen and others.

Robert E. Breecker, Oakland, Cal., James L. Larson, Doron Weinberg, Stender, Stender & Weinberg, San Francisco, Cal., for plaintiffs Moses, and others.

James L. Browning, Jr., U. S. Atty., and James A. Bruen, Asst. U. S. Atty., Chief, Civ. Div., San Francisco, Cal., for defendants A. J. Monger, and others and S. R. Foley, Jr., and others.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PECKHAM, District Judge.

FINDINGS OF FACT

1. Plaintiffs Wayne M. Allen, David R. Gibson, Norman L. Jones, Richard C. Luton, II, and Peter R. Pendleton were at the time of the filing of this action enlisted members of the United States Navy assigned to the USS Hancock (CVA-19).

2. Prior to March 9, 1973, plaintiff Wayne Allen and Michael Ferner (another seaman) prepared a petition to Congressman Fortney Stark. The body of the petition read as follows:

> Dear Congressman Stark,
>
> We, the undersigned crew members of the U.S.S. HANCOCK, in recognition of the fact that the United States is officially no longer at war with the countries of Indo-China, and because the HANCOCK has already been in commission for 29 years, respectfully request that you ask Congress to investigate the necessity of having the HANCOCK make another West Pacific cruise.

3. The petition was drafted on board the USS Hancock. (R.T. 21.) Copies of the petition were prepared at a private place of business at no expense to the government. (R.T. 21.)

4. The USS Hancock (CVA-19) is an aircraft carrier with a normal crew of approximately 3400 persons. It was first commissioned in 1944 and, with

the exception of six years following the end of World War II, has been in commission since that time.

5. At all revelant times until early May 1973, the USS Hancock was located at the Naval Air Station, Alameda, California. In early May 1973, the USS Hancock deployed for the Western Pacific.

6. On March 9, 1973, Michael Ferner made a written request to defendant Captain A. J. Monger, commanding officer of the USS Hancock, that the petition be authorized for distribution. (R.T. 22; Exh. F to Complaint.)

7. At this time plaintiff Allen intended to participate in the distribution of the petition, but decided to wait until Mr. Ferner received an answer from Captain Monger. (R.T. 22-23.)

8. On March 19, 1973, Captain Monger denied Mr. Ferner's request. (Exh. G to Complaint.)

9. Despite the denial of his request, Mr. Ferner did circulate the petition on board the USS Hancock during his off-duty hours on the mornings of March 20 and 21, 1973. (R.T. 12-13.)

10. At about 3:00 p.m. on March 21, 1973, Mr. Ferner was ordered to report to Captain Monger to answer a charge of violating Article 92, Uniform Code of Military Justice: failure to obey a lawful order not to distribute the petition. Captain Monger found that Mr. Ferner had committed the offense charged and imposed punishment of a reduction in rating, a fine of One Hundred Fifty dollars, and twenty days restriction to the ship. (R.T. 12-13; Affidavit of Michael Ferner, Exh. J to Complaint at 3-4.)

11. On March 23, 1973, the plan of the day posted for each division on the USS Hancock contained the following notice:

> 7. Results of Captain's Mast of 21 March 1973. FERNER, M. S. HN MEDICAL Violation of UCMJ Art. 92: Failure to obey a lawful order from Captain A. J. Monger, to wit: not to circulate a petition. Awarded: Forfeiture for [sic] $150 for 1 month, reduction in rate, and 20 days restriction.

This notice was read aloud on H division, where plaintiffs Allen, Jones, and Pendleton were stationed. (R.T. 13; Exh. K to Complaint.)

12. Plaintiffs all desired to circulate this petition but refrained from doing so because of Captain Monger's denial and the punishment given to Michael Ferner. They filed the present action on behalf of themselves and all others similarly situated on May 4, 1973. (R.T. 12-13; Complaint, p. 6, ¶ 29.)

13. Since the filing of this action, plaintiffs Allen, Jones and Pendleton have been discharged from the United States Navy. Plaintiffs Gibson and Luton are still members of the United States Navy and are still stationed on the USS Hancock. (R.T. 79.)

14. Plaintiffs George T. Moses, Michael T. Gavin, Peter C. Berry, Scott R. Keller, Floyd R. Duncan were at the time of the filing of this action enlisted members of the United States Navy assigned to the USS Midway (CVA-41). (Complaint, p. 2, ¶¶ 2-6.)

15. Sometime prior to May 1, 1973, plaintiffs Gavin, Moses, Keller and Duncan prepared a petition

to members of Congress. The body of the petition read as follows:

> We, the crew and families of the U.S.S. Midway, do hereby exercise our rights as citizens of the United States of America to petition Congress on the following issue. We object to the homeporting in Yokosuka, Japan of the U.S.S. Midway for the following reasons:
>
> (1) We are freely opposed to the excessive expansion and imposition of United States military forces overseas. Homeporting the Midway in Yokosuka is another attempt by the U.S. to permanently establish its military presence in Asia.
>
> (2) We object to the false statements made by the military that there is an *all volunteer* crew to deploy to Yokosuka.
>
> (3) We disapprove of the government's lack of preparations in providing housing and other living accommodations to support our full complement of crew and families.
>
> (4) It is the right of all military personnel as citizen-soldiers of the U.S. to practice individually or collectively their rights as citizens, namely
>
> (a) the right to free speech, (b) the right to peacefully assemble, (c) freedom of the press, and (d) the right to petition Congress.

(Exh. A to Complaint.)

16. Copies of the petition were prepared at no expense to the government at a private place of business. (R.T. 42, 57.)

17. The USS Midway (CVA-41) is an aircraft carrier with a normal crew of approximately 3500 persons. At all relevant times until September 10, 1973, the USS Midway was located at either Hunters Point Naval Shipyard, San Francisco, California, or Alameda Naval Air Station, Alameda, California. The USS Midway was scheduled to depart for the Western Pacific on September 11, 1973, at which time its home port would be changed from Naval Air Station, Alameda, California to United States Naval Station, Yokosuka, Japan. Deployment to the Western Pacific and change of home port took place as scheduled.

18. During a period of approximately a week prior to May 1, 1973, plaintiffs circulated their petition on board the USS Midway. (R.T. 67, 68.)

19. On May 1, 1973, plaintiffs became aware of Midway Instruction 1620.6, which required commanding officer approval prior to distribution of petitions on board the USS Midway. On May 1, 1973, plaintiffs Moses and Gavin wrote to Captain Foley, Commanding Officer of the USS Midway, and requested his permission to circulate their petition on board the USS Midway. (R.T. 66, Exh. B to Complaint.)

20. On May 4, 1973, Captain Foley denied the request by plaintiffs Moses and Gavins. (Exh. C to Complaint.)

21. On May 23, 1973, plaintiffs Berry, Keller and Duncan submitted a request to circulate a petition identical to the one previously requested but for the addition of the words "and are demoralized by" to the third line of the first paragraph. Captain Foley

similarly denied this request on May 25, 1973. (Exhs. E-J of the Complaint.)

22. Following the denial of their requests, plaintiffs refrained from circulating their petitions on board the USS Midway, fearing punitive action. (R.T. 28-29.)

23. Plaintiffs filed this action on behalf of themselves and all others similarly situated on June 4, 1973. The two actions were joined by the court as related cases.

24. Since the filing of this action, plaintiffs Gavin, Berry and Duncan have been discharged from the Navy. Plaintiffs Keller and Moses are members of the United States Navy assigned to stations other than the USS Midway. (R.T. 75.)

25. No action giving rise to this litigation occurred in or near a combat zone.

26. The First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

27. Title 10, United States Code, § 1034 provides:

> No person may restrict any member of an armed force in communication with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States.

28. Department of Defense Directive (hereinafter "DOD Directive") 1325.6, Section III(A), provides in substance that a commander may prohibit distribu-

tion of a "publication" through other than "official outlets such as post exchange" if he determines there is a "clear danger to the loyalty, discipline, or morale of military personnel, or if the distribution of the publication would materially interfere with the accomplishment of a military mission." Section III(G) of the same directive provides:

> The right of members to complain and request redress of grievances against actions of their commanders is protected by Article 138 of the Uniform Code of Military Justice. In addition, *a member may petition or present any grievance to any member of Congress* (10 U.S.C. 1034). An open door policy for complaints is a basic principle of good leadership, and Commanders should personally assure themselves that adequate procedures exist for identifying valid complaints and taking corrective action. [Emphasis added.]

29. In addition, DOD Directive 1344.10, Enclosure I, ¶ 2, provides that any member on active duty may:

> Sign a petition for specific legislative action . . . provided the signing thereof does not obligate the member to engage in partisan political activity and is taken as a private citizen and not as a representative of the Armed Forces.

30. Naval Instruction (OPNAVINST) 1620.1 is essentially the same as DOD Directive 1325.6 USS Hancock Instruction 1620.4A, which is based on OPNAVINST 1620.1 and DOD Directive 1325.6, extends the commander's power to all "printed materials." USS Midway Instruction 1620.6, the counterpart of HANCOCKINST 1620.4, extends the commander's power to "publications, including but not limited to pamphlets, leaflets, newspapers and petitions . . . .".

31. Defendants interpret the regulations set forth in ¶¶ 27-30 above as giving them the power to censor all petitions or other publications for circulation on board ship prior to distribution. Defendants further maintain that they may, in their sole discretion, prohibit circulation of any petition which they feel would impair the morale or discipline of a ship. (R.T. 85-89.)

32. Defendants maintain that circulation of a petition with which members of a crew might disagree is enough in and of itself to cause disruption on board ship and therefore impair morale. (R.T. 88.)

33. Defendant Admiral Monger testified and this court finds that he might have permitted the circulation of the Hancock petition had it not "been asking for support in the form of a signature" and been directed to a member of Congress. (R.T. 156.) Defendant Monger testified and this court further finds that he might have permitted circulation of the petition well after the Hancock had been deployed, but not before or shortly after deployment. (R.T. 141-142.) The petition would have been of no effect after deployment. If Admiral Monger would have permitted circulation of the petition at all, it would have been in a manner and at a time when the petition would be of no effect.

34. Means were available to both Captain Monger and Captain Foley to counter any factual or other

assertions made in a petition circulated among members of the crew. Such means included meeting with the crew, discussion on closed circuit television, distribution of material in the Plan of the Day or other printed matter, and orders that subordinates discuss the Captain's position with their subordinates. (R.T. 160-163.)

35. The information contained in the petitions was of the type commonly available in the news media in the Bay Area, where the ships were stationed. It contained no information or statements which were not being distributed by the news media and responsible officials including senators and other legislators. It was not libelous, obscene, classified or racially inflammatory.

36. As Captains of their respective ships, Admirals Monger and Foley exerted considerable leadership on their crews. Admiral Monger had successfully asserted the principles of racial equality on board ship and had had a substantial impact in lessening racial tensions by informing the crew that racism was not to be tolerated on board ship. (R.T. 159-160.) If either Captain had informed the crew that the free expression of differing views was not only to be tolerated, but to be encouraged in a free society, such leadership would have had a substantial impact in lessening the disruption, if any, which might be caused by circulation of a petition. (R.T. 160-163.)

37. Circulation of petitions on the flight deck while planes are being launched or landed, or in any work area while persons are on duty, or in sleeping berths

other than those of the circulator, or on the mess decks while meals are being served would—because of the relatively small size of the carriers—interfere or potentially interfere with the orderly functioning of the ship and may properly be prohibited by the ship's Captain. Distribution of petitions by persons while they are actually on duty constitutes an interference with their duty functions and may properly be prohibited. Face to face proselytizing by superiors might put improper pressure on subordinates. Defendants have not presented evidence from which this court finds the need for any further restriction on the right to circulate petitions to Congress.

38. Bulletin boards are available on ship on which either petitions or notices indicating the availability of petitions for signature at another place could be posted. Areas such as libraries, recreation rooms and chaplain's areas are available for direct solicitation of signatures.

39. Forcing persons to secure prior approval of petitions would have a chilling effect on the circulation of such petitions and would deter some persons who otherwise might circulate petitions from doing so out of real or imagined fear of reprisal.

40. The circulation of the petitions at issue herein would not have a substantial negative impact, if any at all, on the discipline, loyalty, or morale of the crew, nor would it interfere with the mission of the ship. What slight impact circulation might have on the morale, loyalty or discipline of the crew is outweighed by First Amendment considerations and by

the positive effect it would have in encouraging the free flow of ideas and bringing problems to the surface which otherwise might be unknown to Congress.

41. Plaintiffs alleged jurisdiction under 28 U.S.C. §§ 1331, 1361, 1651, 2201 and 2202. For the reasons stated in its Memorandum and Order, August 23, 1974, the court finds that the amount in controversy exceeds $10,000, exclusive of interest and costs. The court finds that the nature of the petitions here establishes that amount. In both cases, had the petitions not been prohibited and had Congress, the executive, or Naval officials been persuaded by petitioners to change plans for the carriers, the jurisdictional amount would surely have been saved by not incurring the costs of deploying so many thousands of men and moving their dependents.

While the court finds that the requisite jurisdictional amount is present in this action, the court also believes that it is time to abandon the anomalous requirement that the court examine each case in which a First Amendment right is asserted to determine whether the resulting controversy involves $10,000. First Amendment freedoms are the quintessence of free society. Without them our tangible assets, so readily measured in monetary terms, would mean little. Considering the thousands of sailors who have paid the supreme price in defense of these cherished rights, it is ironic for the Navy even to suggest that they be valued at less than $10,000. First Amendment rights are sacrosanct and should be presumed worth far in excess of $10,000.

42. Plaintiffs in each case brought suit on behalf of the class of persons on board the respective ships who desired to circulate petitions but who refrained from doing so out of fear of punishment by defendants. Plaintiffs asked that the class be certified as follows: "All members of the United States Navy assigned to either the USS Hancock, CVA 19, or the USS Midway, CVA 41, who desire to collect signatures on petitions to Congress from fellow servicemen on board the Hancock or Midway and to petition their Congressmen or women for redress of grievances." Plaintiffs sought certification of the class under Rules 23(b)(1) and 23(b)(2), Federal Rules of Civil Procedure.

43. There are more than 6000 men on the combined ships. Although the number of persons on board who are members of the class will be less than the total number on board, it is fair to say and the court finds that the class is too numerous to name all members. The very nature of the chilling effect asserted here is such as to make it impossible to determine who the members of the class are. In addition, there may be members of the class who desire to circulate petitions with a different and even directly contrary content than those advocated by plaintiffs. Such members are entitled to the protections sought by this class action but might never contact plaintiffs. Plaintiffs herein are represented by counsel familiar with both military law and the First Amendment issues at stake here. Further, at least one plaintiff has already testified at trial, even though he has been discharged from

the Navy. His willingness to pursue the case at his own expense, even after discharge, is evidence that plaintiffs will fairly represent the class. Finally, this litigation is being maintained in large part by the American Civil Liberties Union Foundation, an organization whose main objective is the preservation of the rights guaranteed by the First Amendment. See *Carlson* v. *Schlesinger*, 167 U.S.App.D.C. 325, 511 F.2d 1327, at 1335 (1975, Bazelon, J., dissenting). Under all the circumstances, the court finds that the plaintiffs will adequately represent the needs of the class. The class is so numerous that joinder of all persons is impracticable.

44. The designated class is definite and specific within the meaning of Rule 23. Neither plaintiffs nor defendants can have any doubt as to who comes within its terms. There are questions of law and fact common to a determination of the issues of concern to both the plaintiffs and the class. The defendants are acting on grounds generally applicable to the class and final injunctive and declaratory relief with respect to the class as a whole is appropriate.

45. Initially the defendants argued that the court should abstain from jurisdiction under 10 U.S.C. § 938. The court agreed and abstained. Subsequently at least one of the plaintiffs in each class pursued his administrative remedies and the initial decision of the commanders involved has been sustained by the Secretary of the Navy.

CONCLUSIONS OF LAW

1. The actions are properly consolidated and maintained as a class action as defined in ¶ 42 of the FINDINGS OF FACT (hereinafter "FINDINGS").

2. Plaintiffs have exhausted their administrative remedies. In view of the certification as a class, it is not significant that all of the plaintiffs herein did not pursue their administrative remedies. See *Gerstle* v. *Continental Airlines, Inc.*, 50 F.R.D. 213, 216 (D. Colo. 1970), *aff'd*, 466 F.2d 1374 (10th Cir. 1972).

3. For the reasons stated in the court's Memorandum and Order, August 23, 1974, at 4-7, jurisdiction exists by virtue of 28 U.S.C. § 1331. The amount in controversy exceeds the sum of $10,000 exclusive of interest and costs. (See FINDINGS ¶ 41.)

4. An actual controversy has arisen and now exists between the plaintiffs and the class they represent on the one hand and the defendants on the other, regarding the rights of the plaintiffs and their class to circulate petitions to members of Congress. A determination by this court is necessary and proper to resolve that controversy.

5. Plaintiffs and the class they represent have no plain, adequate, or complete remedy at law to redress the wrongs complained of herein. Suit for declaratory and injunctive relief is their only means of securing redress from defendants' unlawful conduct. Plaintiffs and the class they represent are now suffering and will suffer irreparable injury from defendants' acts and conduct. If defendants are not en-

joined, they will continue to act in a manner which impermissibly interferes with and chills the First Amendment and statutory rights of plaintiffs and the class they represent. Injunctive relief is therefore necessary and proper.

6. Civil Action Nos. C-73-734-RFP and C-73-1012-RFP raise identical issues of law and virtually identical factual questions. The defendants in both actions are substantially identical and the plaintiff classes are substantially identical. It is appropriate that the two actions be consolidated for disposition.

7. Department of Defense Directive 1325.6, Naval Instruction 1620.1 USS Hancock Instruction 1620.4A, and USS Midway Instruction 1620.6 authorize a prior restraint on the publication and circulation of petitions to members of Congress. The challenged regulations reach into protected as well as possibly unprotected First Amendment activity. The activity in which plaintiffs herein engaged is protected by the First Amendment and by 10 U.S.C. § 1034. See *CCCO* v. *Fellows*, 359 F. Supp. 644 (N.D. Cal. 1972); *Flower* v. *United States*, 407 U.S. 197, 92 S.Ct. 1842, 32 L.Ed.2d 653 (1972); *Carlson* v. *Schlesinger*, 167 U.S.App.D.C. 325, 511 F.2d 1327 (1975). Plaintiffs and the class they represent have standing to challenge the regulations as overbroad. *Carlson, supra.* And the overbroad prior restraint is unconstitutional. *Lewis* v. *City of New Orleans*, 415 U.S. 130, 134, 94 S.Ct. 970, 39 L.Ed.2d 214 (1974); *Barenblatt* v. *United States*, 360 U.S. 109, 137, 79 S.Ct. 1081, 3 L.Ed.2d 1115 (1959).

As Judge Orrick wrote recently in invalidating a similar Air Fare regulation,

> A law is overbroad "if in its reach it prohibits constitutionally protected conduct". *Grayned* v. *City of Rockford*, 408 U.S. 104, 114, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). Even without actual prohibition, the chilling effect which inheres in overly broad restrictions in general is particularly apparent in a military setting, where petitions addressed to members of Congress are very likely to involve complaints about military policies or about the administration of military affairs by superior officers. To require that all petitions to be circulated be passed upon first by the base commander imposes a considerable burden upon the free exercise of the First Amendment right of petition for redress of grievances.

Glines v. *Wade*, 401 F.Supp. 127, at p. 131 (1972).

8. Even if the regulations were not void on their face, they have been applied in this case in a manner which violated the First Amendment rights of plaintiffs and the class they represent to free speech and association and their right to petition for redress of grievances. To the extent that they authorize any interference with the circulation of petitions to Congress other than that expressly stated in 10 U.S.C. § 1034, the challenged regulations are also inconsistent with 10 U.S.C. § 1034 and void as applied to the conduct engaged in by plaintiffs.

9. Defendants may properly invoke military and civil law where appropriate to punish civilly or criminally persons who circulate defamatory, classified,

obscene or racially inflammatory matter; but outside a combat zone, they may not require pre-screening of petitions nor place any other prior restraint on the circulation of petitions on board ship. *Near* v. *Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931); *New York Times* v. *United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971).

10. Defendants may promulgate new regulations relating to the circulation of petitions on board ship, but those regulations must be consistent with the Findings and Conclusions herein and specifically must conform to at least the following minimum guidelines:

(a) Outside a combat zone there may be no prior restraint, or censorship of petitions to Congress. No prior approval or prior submission to a commanding officer or other official may be required. The right of the drafter and circulator of a petition to remain anonymous shall be preserved. *Talley* v. *California*, 362 U.S. 60, 80 S. Ct. 536, 4 L.Ed.2d 559 (1960); *Bates* v. *Little Rock*, 316 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480 (1960).

(b) Defendants may prohibit the distribution of petitions in work areas while persons are on duty in such areas. Defendants may prohibit the circulation of petitions by persons on duty or to persons on duty. For purposes of this Order the phrase "on duty" is intended to mean actually at work or at a working station and does not include persons who may be required to report for duty on short notice or those on standby duty. Defendants may also prohibit the distribution of petitions in sleeping areas other than those

of the circulator. Defendants may also prohibit distribution of petitions at the mess hall during meals. Finally, defendants may forbid the circulation of petitions by superior officers in such a manner that subordinates may feel coerced into signing such a petition. Should defendants invoke this provision to forbid face to face proselytizing by superiors, they must provide some other means of permitting subordinates to sign petitions circulated by superiors, such as bulletin board notices on which the rank—or if necessary, the name—of the circulator is not given. In no event may there be any limitation on circulation of petitions to persons of equal or higher rank other than the limitations of this paragraph which apply to all circulation of petitions.

(c) The limitations on the right to petition which are authorized by subparagraph (b) are necessitated by the exigencies of shipboard life. In order to mitigate the effects of those limitations on face to face proselytizing, defendants shall permit reasonable use of bulletin boards for the circulation of petitions. Interested sailors should be given access to the bulletin board to post notices of the availability of petitions for signing or to post copies of the petition. Defendants may regulate the length of time such petitions remain on bulletin boards to some reasonable time, not less than two weeks. The use of bulletin boards is in addition to and not in lieu of face to face contact which is not inconsistent with the limitations set forth in subparagraph (b).

(d) No other restrictions on the circulation of petitions outside a combat zone may be made or

enforced without prior approval of the court. The parties may at any time return to the court to seek modification or expansion of this Order to meet circumstances heretofore not anticipated.

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In the Supreme Court

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United States

OCTOBER TERM, 1978

No. 78-1005

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Petitioners

VS.

WAYNE M. ALLEN, Et Al.
Respondents

HAROLD R. BROWN, SECRETARY OF DEFENSE, Et Al.,
Petitioners

VS.

GEORGE T. MOSES, Et Al.
Respondents

OPPOSITION TO PETITION FOR CERTIORARI

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REASONS FOR DENYING THE WRIT

The courts below enjoined the Department of Defense from requiring prior approval of the content of petitions to Congress circulated by servicemen in non-combat zones. The plaintiffs had been refused permission to circulate because their respective commanders found the petitions to present danger to "loyalty, discipline or morale". On close examination the courts below found that the commanders' actions conflicted with 10 U.S.C. § 1034 and with the First Amendment. The Solicitor General has petitioned for certiorari.

The Solicitor General's Petition for Certiorari offered no reasons for granting the writ. Rather, the Solicitor Gen-

eral asked only that this Court defer action on the petition until the Court rules on the petition for certiorari in *Secretary of the Navy, et al. v. Private Frank L. Huff, et al.*, No. 78-599. We file this response at the request of the Clerk of Court and we assume that the reasons on which the government relies in its motion in this case are the same as those upon which it relies in *Huff*. We agree with the implication of the government's petitions in this case, in *Huff*, and in *Harold R. Brown, et al. v. Albert Edward Glines*, No. 78-1006 that the cases present substantially similar issues of law.

Respondents' Opposition in *Huff* and the decisions of the various courts of appeal and district courts in the three cases before this Court amply demonstrate the correctness of the decisions below as a matter of law and we will not repeat those arguments here. See, *Allen v. Monger*, 583 F.2d 438 (9th Cir. 1978); *Allen v. Monger*, 404 F.Supp. 1081 (N.D.Cal. 1975); *Huff v. Secretary of the Navy*, 188 U.S. App. D.C. 26, 575 F.2d 907 (1978); *Huff v. Secretary of the Navy*, 413 F.Supp. 863 (D.C. 1976); *Glines v. Wade*, 586 F.2d 675 (9th Cir. 1978); *Glines v. Wade*, 401 F.Supp. 127 (N.D. Cal. 1975); *see also, Carlson v. Schlesinger*, 167 U.S. App. D.C. 325, 511 F.2d 1327 (D.C. Cir. 1975) (restrictions permitted in combat zone).

We do feel compelled to note the obvious: there is no conflict among the circuit courts on this issue and indeed no conflict among the district courts. All are agreed that prior restraints on circulation of petitions to members of Congress in non-combat zones is prohibited, if not by the explicit terms of 10 U.S.C. § 1034, then by the First Amendment. The issue can hardly be as difficult as the Solicitor General would have us believe. We concede that if this Court grants the petition in *Huff* it should also grant the petition in the instant case. For the reasons set forth below, however, we believe that the procedural posture and the

facts of the instant case offer compelling support for the lower court decisions in all of the cases.

1. The Department of Defense Has Operated for Three and Half Years Without Seeking Relief From the District Court's Injunction.

The Solicitor General states in the *Huff* petition that "some form of prior review by command personnel of proposals to circulate petitions on military bases is essential to the discipline, readiness and morale of the armed forces, and is thus necessary to the security of the nation." *Huff*, Petition for Writ of Certiorari at 9. The procedural posture of this and the other cases suggests that the assertion is suspect at best and disingenuous at worst. On July 11, 1975 after hearing a total of three days of testimony, actually visiting an aircraft carrier at the request of the government (See Clerk's Transcript at 183), and considering additional deposition testimony of five witnesses, the trial court issued its injunction. *Allen v. Monger*, 404 F.Supp. 1081 (1975) (See also C.T. at 298-301). The government neither sought a stay of that injunction in the district court nor did it seek immediate relief in the Ninth Circuit. (The government did move to expedite the appeal. That motion was denied on September 20, 1976 and the government took no further steps.) On October 4, 1978 the Ninth Circuit rendered its decision affirming in all respects the District Court decision. *Allen v. Monger*, 583 F.2d 438 (1978). The government made no request for a stay, nor did it seek immediate relief in this Court. Thus for more than three and one half years the Department of Defense has been under an order prohibiting the imposition of any prior restraint on the circulation of petitions by servicemen on military bases in non-combat zones. Nowhere below and nowhere in the petition for certiorari has the government shown the precise nature of the order's effect on discipline, readiness or morale, nor has it suggested anywhere but in

these proceedings that the security of the nation has been in danger for the past three and one half years.

2. Permission to Circulate the USS HANCOCK Petition Was Denied Solely Because the Petition Was Intended for Members of Congress.

The commanders below found that the petitions presented "a clear danger to the loyalty, discipline or morale" of the troops under their command. See, Findings of Fact, ¶ 28, 404 F.Supp. at 1086. That is strong language indeed. It is therefore appropriate at the outset to provide the text of the offending documents. The petition sought to be circulated on the USS HANCOCK read as follows:

> Dear Congressman Stark,
>
> We, the undersigned crew members of the U.S.S. HANCOCK, in recognition of the fact that the United States is officially no longer at war with the countries of Indo-China, and because the HANCOCK has already been in commission for 29 years, respectfully request that you ask Congress to investigate the necessity of having the HANCOCK make another West Pacific cruise.

The MIDWAY petition is somewhat longer but presents approximately the same danger to the military:

> We, the crew and families of the U.S.S. MIDWAY, do hereby exercise our right as citizens of the United States of America to petition Congress on the following issue. We object to and are demoralized by the homeporting in Yokosuka, Japan, of the U.S.S. MIDWAY for the following reasons:
>
> (1) We are freely opposed to the excessive expansion and imposition of United States military forces overseas. Homeporting the MIDWAY in Yokosuka is another attempt by the U.S. to permanently establish its military presence in Asia.

> (2) We object to the false statements made by the military that there is an *all volunteer* crew to deploy to Yokosuka.
>
> (3) We disapprove of the governments [sic] lack of preparations in providing housing and other living accomadations [sic] to support our full complement of crew and families.
>
> (4) It is the right of all military personnel as citizen-soldiers of the U.S. to practice individually or collectively their rights as citizens, namely, (a) the right of free speech, (b) the right to peacefully assemble, (c) freedom of the press, and (d) the right to petition Congress.

What was it about these petitions that led two experienced naval officers to conclude that they were a clear danger to the loyalty, discipline or morale of their subordinates? Apparently, only that *Congress* would get the very information contemplated by 10 U.S.C. § 1034. On cross-examination the former captain of the USS HANCOCK testified that he would have permitted distribution of the material in the petition had it been anything other than a petition to Congress:

> Q. Everything in this petition, if that information were in the New York Times, you would have no problem with its distribution?
>
> A. No.
>
> Q. If someone clipped that article out of the New York Times you would have no problem with its distribution? In fact, that goes on quite often?
>
> A. No.
>
> Q. If somebody—please forget copyright laws—distributed that information to people on board ship, would you have any problem with that, on a leaflet?
>
> A. Probably not, unless they asked for a signature.

Q. Unless they asked for a signature. So what we are—what we are really getting at then is—is a question of asking for a signature, that is, the fact that it is a petition is what gave you the difficulty?

A. They are asking for support in the form of a signature.

Q. It was your understanding, was it not, that those signatures on that petition were ultimately to be transmitted to a member of Congress; was that your understanding?

A. I believe that was in the request, and that's certainly what the petition is addressed to, a Congressman. That was an assumption, I believe, I made at the time.

Testimony of Admiral (formerly Captain) A. J. Monger, Reporter's Transcript at 156. *See,* Findings of Fact, ¶ 33-35, 404 F.Supp. at 1086-1087.

It appears as if the only danger to morale in question was the danger to the captain's morale.

The facts so well illustrated by the HANCOCK captain's testimony present a situation precisely the reverse of *Greer v. Spock*, 424 U.S. 828 (1976), on which the government relies so heavily. In *Spock* the Court upheld a prohibition against civilian political campaign leafletting on a restricted military training base in order "to [keep] the military separate from political affairs" and in order to enforce the "express provision for civilian control of the military in Art. II, § 2 of the Constitution." 424 U.S. at 841. (Burger, C.J., concurring). The thrust of *Spock* was, in the majority words of Mr. Justice Stewart, to maintain the "American constitutional tradition of a politically neutral military establishment *under civilian control.*" 424 U.S. at 839 (emphasis added). It is precisely that tradition which the First Amendment and 10 U.S.C. § 1034 are designed to

protect and it is precisely that tradition which Captain Monger tried to subvert under the guise of national security.

The refusal of the MIDWAY'S captain to permit circulation of the MIDWAY petition further illustrates the very arbitrariness which flourishes where prior restraint is permitted. Admiral Foley testified in deposition that the petition presented no danger to loyalty or to discipline, a position he backed off from at trial. See, R.T. 111-13. He questioned the petition's truthfulness. (R.T. 130-31), although he admitted he had the means to rebut untruthful statements (R.T. 120). He said the petition would cause "inconvenience" to the crew. (R.T. 117-18). And he admitted that the petition in no way urged refusal of orders. (R.T. 108) His undifferentiated fear of the written word cannot support abrogation of the right to petition Congress.

3. The Trial Court's Findings and Conclusions Are Consistent With the Expressed Needs of the Military.

The court recognized that a military commander may reasonably regulate the "time, place and manner" of speech. *Cox v. Louisiana,* 379 U.S. 559 (1965). It recognized, however, that there is a difference between absolute prohibition and reasonable regulation. It sought the aid of Admiral Monger (formerly the HANCOCK's captain) in determining the permissible level of time, place and manner regulation. The final order encompasses almost exactly what Admiral Monger testified would be a reasonable basis for circulating petitions generally on board ship if they were to be allowed at all:

Q. . . . what I am trying to do is pin down the areas where you would not want it circulated.

A. I think any berthing space, any working space, and certainly the mess decks. Our mess decks were

smaller in proportion to the crew than most any other ship.

Q. Beyond those places are there any other places where it would disrupt the function of the ship to have petitions circulated?

A. There aren't very many places left, very frankly.

R.T. 147-48.

The district court ordered the following:

> Defendants may prohibit the distribution of petitions in work areas while persons are on duty in such areas. Defendants may prohibit the circulation of petitions by persons on duty or to persons on duty. For purposes of this Order the phrase 'on duty' is intended to mean actually at work or at a working station and does not include persons who may be required to report for duty on short notice or those on standby duty. Defendants may also prohibit the distribution of petitions in sleeping areas other than those of the circulator. Defendants may also prohibit the distribution of petitions at the mess hall during meals. Finally, defendants may forbid the circulation of petitions by superior officers in such a manner that subordinates may feel coerced into signing such a petition.

404 F.Supp. at 1090.

This was no broadside swipe at the military justice system. The decision below was in this and all other respects a considered effort to accommodate competing interests. It was made with full consideration for the views of the military personnel who now petition this Court and it accommodated those views to the demands of Congress and the First Amendment. In doing so it anticipated this Court's concern—as expressed in *Greer v. Spock*—that civilians maintain control over the military. That control

is subverted when commanders may cut off the effective flow of information from enlisted persons to Congress.

CONCLUSION

For the aforementioned reasons the petitions for a writ of certiorari in this case and in *Huff* and *Glines* should be denied.

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February 21, 1979